Bank Perusahaan Kecil dan Sederhana Malaysia Bhd v Pinggir Merpati Sdn Bhd & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02(NCVC)(W)-946–05 OF 2014
ALIZATUL KHAIR, ABANG ISKANDAR AND NALLINI PATHMANATHAN JJCA
8 AUGUST 2016

Contract — Breach — Notice of demand — Parties entered into loan agreement — Appellant's audit division discovered supporting documents submitted by respondents were forgeries — Appellant demanded outstanding amount — Whether prior termination required before demand — Whether notice of demand sufficient to recover outstanding amount

Evidence — Documentary evidence — Admissibility of — Parties entered into loan agreement — Appellant's audit division discovered fraud and prepared audit report — Whether audit report admissible

The appellant had offered facilities of a working capital loan of RM5m to the first respondent to finance a construction and management project known as Kompleks Medan Selera in Shah Alam ('the said project'). As a security for the loan, the parties had entered into various agreements including the loan agreement-fixed asset dated 2 March 2009 ('P3') and also guarantee and indemnity agreement dated 2 March 2010. Subsequently, the appellant's audit division discovered that the supporting documents for the disbursement applications that were submitted by the respondents were forgeries and the appellant then made a police report on the matter. The said project caught fire and later the insurers submitted a cheque for the insurance compensation claim amounting to RM2,558,751 to the appellant which the appellant used to set off the amount owed to them by the respondents. The appellant via its solicitor sent a letter of demand for the balance outstanding amount but the respondents refused to pay. Consequently, the appellant commenced an action against the respondents to claim for the outstanding amount. In response to the appellant's action, the respondent filed counterclaim for general and exemplary damages and argued that the appellant had unlawfully terminated P3. The court dismissed both the claim and counterclaim by the parties. Dissatisfied with the decision, the appellant filed the present appeal. The issues for court's consideration were with regard to: (a) the matter on the sufficiency of notice of demand dated 1 July 2011 to recover the balance outstanding amount; and (b) the matter pertaining to the admissibility of the audit report ('P27') prepared by the appellant's officer ('SP6').

Held, allowing the appeal and setting aside the decision of the High Court with costs of RM20,000 here and below:

(1) P3 had been akin to an 'On Demand' agreement. A prior termination of the P3 was not a precondition that the appellant was obliged to undertake before demand could be mounted against the respondents. For the purposes of complying with the provisions of the P3, it was sufficient that a notice of a kind dated 1 July 2011 was served on the respondents. As such, the issue on service of notice of termination did not arise (see para 25).

(2) Everything about P27 was done by SP6 who undertook the inquiry into the possibility of fraud having been perpetrated on the appellant's bank by the first respondent by using supporting documents which were forged to mislead the appellant. The question of P27 being admissible should never have been raised. There was no valid reason as to why P27 ought not to be admitted as evidence (see para 30).

(3) By the respondents failing to effectively cross-examine SP6 and by them failing to call the persons referred to in the report P27, the appellant had proven its case on the fraud beyond reasonable doubt. Further, since the respondents offered no evidence, the case of the appellant must be deemed to be the truth in the absence of rebuttal evidence led by the respondents to the contrary (see paras 33 & 36).

[Bahasa Malaysia summary

Perayu menawarkan kemudahan modal kerja sebanyak RM5 juta kepada responden pertama untuk membiayai projek pembinaan dan perngurusan yang dikenali sebagai Kompleks Medan Selera in Shah Alam ('projek tersebut'). Sebagai jaminan bagi pinjaman, pihak-pihak telah memasuki pelbagai perjanjian termasuk perjanjian pinjaman aset tetap bertarikh 2 Mac 2009 ('P3') dan juga perjanjian gerenti dan indemniti bertarikh 2 Mac 2010. Kemudiannya, bahagian audit perayu memperolehi bahawa dokumen sokongan bagi permohonan pembayaran yang diserahkan oleh responden-responden adalah pemalsuan dan perayu kemudiannya membuat laporan polis atas perkara ini. Projek tersebut terbakar dan kemudiannya syarikat insurans memberikan cek bagi tuntutan pampasan insurans berjumlah kepada RM2,558,751 kepada perayu yang mana perayu gunakan untuk set off jumlah yang kena dibayar kepada mereka oleh responden-responden. Perayu melalui peguam caranya menghantar surat menuntut bagi baki jumlah yang belum dijelaskan tetapi responden-responden enggan membayar. Akibatnya, perayu memulakan tindakan terhadap responden untuk menuntut bagi jumlah yang belum dijelaskan tersebut. Dalam menjawab kepada tindakan perayu, responden-responden memfailkan tuntutan balas bagi ganti rugi am dan teladan dan berhujah bahawa perayu telah secara tak sah menamatkan P3. Mahkamah menolak kedua-dua tuntutan dan tuntutan balas oleh

pihak-pihak. Tidak berpuas hati dengan keputusan tersebut, perayu memfailkan rayuan ini. Isu-isu untuk pertimbangan mahkamah adalah berkaitan: (a) perkara mengenai kecukupan notis tuntutan bertarikh 1 Julai 2011 untuk mendapatkan baki yang belum dijelaskan; dan (b) perkara mengenai kebolehterimaan laporan ('P27') yang disediakan oleh pegawai perayu.

Diputuskan, membenarkan rayuan dan mengenepikan keputusan Mahkamah Tinggi dengan kos sebanyak RM20,000 di mahkamah ini dan Mahkamah Tinggi:

(1) P3 telah disamakan kepada perjanjian 'On Demand'. Penamatan P3 sebelumnya bukan pra syarat bahawa perayu bertanggungjawab untuk memulakannya sebelum tuntutan boleh dibangkitkan terhadap responden-responden. Bagi tujuan mematuhi peruntukan P3, ia adalah mencukupi bahawa notis sedemikian bertarikh 1 Julai 2011 diserahkan ke atas responden-responden. Dengan itu, isu atas penyerahan notis penamatan tidak berbangkit (lihat perenggan 25).

(2) Kesemua mengenai P27 dilakukan oleh SP6 yang memulakan siasatan kepada kemungkinan fraud dilakukan ke atas bank perayu oleh responden pertama dengan menggunakan dokumen sokongan yang dipalsukan untuk menipu perayu. Persoalan terhadap P27 sebagai boleh diterima tidak patut dibangkitkan. Tidak terdapat alasan sah mengapa P27 patut tidak dimasukkan sebagai keterangan (lihat perenggan 30).

(3) Dengan kegagalan responden-responden untuk secara efektif memeriksa balas SP6 dan kegagalan untuk memanggil orang-orang yang dirujuk di dalam laporan P27, perayu telah membuktikan kesnya atas fraud melampaui keraguan munasabah. Selanjutnya, memandangkan responden-responden tidak menawarkan keterangan, kes perayu mesti dianggap benar dalam ketiadaan bantahan keterangan yang diberikan oleh responden-responden untuk menentang (lihat perenggan 33 & 36).]

Notes

For a case on notice of demand, see 3(3) *Mallal's Digest* (5th Ed, 2015) para 3688.

For cases on admissibility of documentary evidence, see 7(1) *Mallal's Digest* (5th Ed, 2015) paras 1456–1482.

Cases referred to

AEG Carapiet v AY Derderian AIR 1961 Cal 359, HC (refd)
Arnold v Britton and others [2015] UKSC 36, SC (refd)
Browne v Dunn (1893) 6 R 67, HL (refd)
Jaafar bin Shaari & Anor (suing as administrators of the estate of Shofiah bte

Ahmad, Deceased) v Tan Lip Eng & Anor [1997] 3 MLJ 693; [1997] 4 CLJ 509, SC (refd)
Powe (deceased), Re; Powe v Barclays Bank Ltd [1955] 3 All ER 448 (refd)
Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd [2015] 5 MLJ 1; [2015] 7 CLJ 584, FC (refd)
Yoong Sze Fatt v Pengkalen Securities Sdn Bhd [2011] 4 MLJ 805; [2010] 1 CLJ 484, CA (distd)

Legislation referred to

Evidence Act 1938 [UK] s 1(4)
Evidence Act 1950 ss 45, 60

Appeal from: Civil Suit No 22NCVC-798 of 2011 (High Court, Shah Alam)

Nor Shahadah bt Saari (Shukor Baljit & Partners) for the appellant.
Shahinuddin bin Shariff (Shahinuddin & Ranjit) for the respondents.

Abang Iskandar JCA:

BRIEF FACTS

[1] Via an offer letter dated 12 November 2007 and a variation of terms letter dated 30 December 2008, the appellant, Bank Perusahaan Kecil dan Sederhana Malaysia, the plaintiff in the court below, ('the plaintiff') had offered facilities of a working capital loan of RM5m to, Pinggir Merpati Sdn Bhd, the respondent and the defendant in the court below, ('the first defendant') to finance a construction and management project known as Kompleks Medan Selera in Shah Alam.

[2] As security for the loan, the first defendant entered into the following agreements:

(a) loan agreement — fixed asset dated 2 March 2009 ('P3');

(b) deeds of assignment (for payment of rental proceeds) dated 2 March 2009;

(c) debenture dated 2 March 2009;

(d) memorandum of deposit cum deed of assignment of fixed deposit/*Mudharabah* investment account by company dated 2 March 2007;

(e) memorandum of deposit cum deed of assignment of fixed deposit/*Mudharabah* investment account by way of sinking fund dated 2 March 2007; and

(f) third party deed of assignment on all rights and benefits by Lazim Berkat Sdn Bhd dated 2 March 2009.

[3] As security for the loan, one Mohd Musyiri bin Majid ('the second defendant') and Syed Mohd Azlee bin Syed Hassan ('the third defendant') signed a guarantee and indemnity agreement dated 2 March 2010.

[4] In accordance with the agreement, the plaintiff, upon the application of the first defendant with supporting documents, disbursed monies in four instalments as follows:

Date	Sum
13 February 2009	RM2,184,932.09
13 March 2009	RM1,506,259.11
7 April 2009	RM1,094,222.30
16 June 2009	RM214,586.51

[5] The plaintiff's audit division subsequently discovered that the supporting documents for the disbursement applications that were submitted by the defendants were forgeries.

[6] On 14 April 2010, the plaintiff made a police report that the defendants had used forged documents and tricked the plaintiff into disbursing RM5m. The police investigations are still ongoing.

[7] The said Kompleks Medan Selera caught fire on 16 January 2010. The insurers submitted a cheque for the insurance compensation claim amounting to RM2,558,751 to the plaintiff. The plaintiff set off that amount against the sum owed to them by the defendants. This arrangement was as per P3 as contained in section 8.04 under article VIII. This left a balance of RM2,821,988.70 as being due from the defendants.

[8] On 1 July 2011, the plaintiff's solicitors sent a letter of demand to the defendants for the balance RM2,821,988.70. However, the defendants refused to pay.

[9] The plaintiff filed this claim on 12 July 2011 to recover the sum of RM2,821,988.70 together with interest.

[10] The defendants, on the other hand, filed an amended counterclaim dated 10 August 2012 for general and exemplary damages, claiming that the plaintiff had unlawfully terminated the loan agreement.

[11] The High Court found that the plaintiff had not made out a case that required the defendants to rebut. The defendants had no case to answer, therefore the plaintiff's claim was dismissed with costs of RM10,000. Thus, this appeal by the plaintiff.

[12] The High Court also dismissed the counterclaim as the defendants did not give any evidence in support of it. There was, however, no appeal filed by the defendants against the dismissal of the counterclaim.

THE APPEAL

[13] We heard this appeal on 13 May 2015. After perusing the records of appeal and submissions by both parties, we allowed the appeal by the plaintiff.

[14] Before us, the following two issues were ventilated, namely that:

(a) the matter on the sufficiency of notice of demand dated 1 July 2011 to recover the sum of RM2,821,988.70 due and owed; and

(b) the matter pertaining to the admissibility of the audit report ('P27');

The issue on notice of termination of the agreement or was it merely a notice of demand ('the NOD')

[15] It was not in dispute that the first defendant had borrowed RM5m from the plaintiff. It was also not in dispute that the plaintiff had disbursed the whole amount of RM5m in four tranches upon application for disbursement of the same made by the first defendant to the plaintiff as provided for under the loan agreement. The plaintiff in this suit had claimed from the defendants a sum of RM2,821,988.70 being the balance of the said loan facility, after the plaintiff had set-off RM2,558,751.11 that the insurers had paid to the plaintiff pursuant to a fire that had destroyed the premise of the first defendant. That set-off was not in dispute as it was allowed under the provisions under section 8.04 of the loan agreement on 'application of insurance monies'.

[16] The plaintiff had issued a letter of demand dated 1 July 2011 to all the defendants requiring all the defendants to pay the sum of RM2,821,988.70 which was the figure that was outstanding and remaining due and unpaid as of the date of the letter of demand.

[17] The three defendants did not pay up the amount that was due. It was their contention that no notice of termination of the loan facility was ever sent to them by the plaintiff.

[18] This contention by the defendants had found favour with the learned

trial judge who in his grounds of judgment, had stated as follows:

> Maka itu mahkamah dapati tiada keterangan oleh plaintif bilakah sebenarnya perjanjian kemudahan tersebut ditamatkan dan dimanakah notis yang menamatkan perjanjian tersebut serta klausa yang digunakan bagi penamatan perjanjian. 'P13A' tidak merujuk kepada mana-mana klausa perjanjian. Oleh itu tidak diketahui adakah plaintif menamatkan atau membatalkan perjanjian pinjaman kerana kemungkiran defendan-defendan ke atas terma dan syarat perjanjian pinjaman 'P3' atau kemungkiran terma 9(a) dan/atau (c) surat tawaran 'P1'. Mahkamah juga tidak jelas adakah pembatalan/penamatan perjanjian kemudahan dilakukan oleh plaintif kerana pemalsuan ke atas jaminan korporat 'P9' atau kerana pemalsuan ke atas dokumen-dokumen sokongan bagi tuntutan 'disbursement' pertama hingga keempat oleh defendan. Tiada keterangan oleh plaintif dalam perkara ini. Plaintif tidak boleh menggunakan laporan polis 'P28' bertarikh 14 April 2010 sebagai notis penamatan perjanjian. Maka itu adalah dapatan oleh Mahkamah ini bahawa tidak terdapat notis penamatan perjanjian kemudahan yang sah oleh plaintif kepada defendan-defendan dalam menamatkan kemudahan pinjaman tersebut.

[19] The long and short of it was that according to the learned trial judge, the termination by the plaintiff of the loan facility agreement was unlawful. As such, it could not claim as a result of alleged breach by the first defendant to repay the loan or the guarantors for failure to make good the default.

[20] We had occasion to peruse through the loan agreement P3 and we found that there was nothing contained in the provisions therein which had made it a precondition that there must be a prior termination of the loan agreement before the plaintiff could be properly clothed to send a demand for any amount that was due for repayment but had remained unpaid by the defendants. In fact, section 9.01 of P3 entitled 'repayment on demand', clearly stipulated that the whole amount shall become due and payable upon the happening of any of the events as enumerated thereunder. We noted that one of the events stated was the event stipulated in para (h) to section 9.01. Paragraph (h) reads: 'If any statement, representation or warranty made in connection with ... delivery of this loan agreement or any other security documents referred to herein or in connection with any request for disbursement hereunder shall be found to be incorrect'. There was again para (n) to the same section 9.01 which stated as follows: 'If the bank has been misrepresented, wilfully misled or pertinent information has been withheld by the borrower with regard to any request for disbursement of the loan and/or the existing financial position of the borrower'; the plaintiff would be properly clothed to trigger the demand for repayment of the whole sum that was due from the defendants. Really, the threshold point required to trigger the bank's right to issue a notice of demand is a low one. P3 had essentially expected accurate and honest information coming from the first defendant pertaining to the crucial documents.

[21] From the overall reading of P3, it was clear to us that the contract between the litigating parties did not make it a precondition that there must be evidence of prior termination of the contract before a claim or demand pertaining to any outstanding monies due under the contract could be mounted. To accede to the submissions of learned counsel for the defendants would mean the court having to write into the loan agreement an obligation against the plaintiff when there was no such stipulation agreed between the contracting parties in this case. While the court interprets the contract to ascertain the intention of the parties by scrutinising the provisions contained within the four walls of the contract, it does not unnecessarily add nor subtract anything from the written contract in the course of discharging such function. That, to our mind is quite trite. But by way of reiteration of a principle of contract law which is rather of significance, we would cite the recent case of *Arnold v Britton and others* [2015] UKSC 36 where Lord Neuberger who wrote the leading judgment of the English Supreme Court had said:

> The parties have control over the language they use in a contract. And, again save perhaps in a very unusual case, the parties must have been specifically focussed on the issue covered by the provision when agreeing to the wording of that provision … it is not the function of a court when interpreting an agreement to relieve a party from the consequences of his imprudence or poor advice. Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party.

[22] In our instant appeal, there was simply an absence of such provision that would obligate the plaintiff to serve any notice of termination before a demand for full recall or repayment of the loan could be triggered. It was not the function of the court to re-write the contract to read into it such an obligation on the plaintiff, when it was clear on the face of it, no such obligation on the plaintiff was agreed between them. This had not been a case where the contractual provisions were ambiguous so as to allow the court's interference by way of necessary inference, in determining the intention of the parties. In this case, it had been a case where the plaintiff, being the lending party had been allowed by the parties when the agreement was signed and sealed, to issue a demand notice on the defendants on the occurrence of any of the events as identified in section 9 of the agreement. We had occasion to look at the section 9.01 in P3. It was housed under 'ARTICLES IX Events of Defaults' 'Section 9.01 repayment on demand' The whole of the principal amount of the loan and interest thereon and any other moneys covenanted to be paid by the borrowers under this loan agreement shall become due and immediately payable and the availability of the loan be cancelled and the security hereby created shall become enforceable in any of the following events: 'This operating paragraph was followed by the various sub-sections/sub-clauses that outlined the events that would trigger the default provisions which were couched in the following terms: a demand by the bank for repayment of the moneys hereby secured or the balance thereof together with interest thereon and any other

moneys due as aforesaid (the bank's certificate as to the amount outstanding shall be final and conclusive and shall not, in the absence of manifest error, be questioned by the borrower) under sub-clauses of section 9.01 hereof may be made by a notice demanding payment within seven days from the date of the notice. Services of such notices shall be effected in the same as provided in section 13.01 hereof'. Suffice to say here that section 13.01 of P3 provided a mechanism pertaining to the modes of service of the legal processes as required under P3.

[23] From the above-quoted provisions under section 9.01 and section 13.01 of P3, there was a clear omission of reference to the need for the plaintiff to serve a notice of termination to the defendants. What P3 required had been the obligation of the plaintiff to serve on the defaulting defendants the notice of demand for immediate repayment of the loan amount that was due. As was alluded to above, the court ought not to relieve the defendants by imposing on the plaintiff an additional duty that was not contained within the four walls of P3. P3 was a result of the bargaining between the litigating parties as to how their affairs were to be managed, including in the event of defaults. They had to live with it. The words of Lord Neuberger in the case of *Arnold v Britton and others* still ring clear in our ears.

[24] Looking at the evidence led in court, we were satisfied that the plaintiff had discharged its duty by serving the notice of demand on the defendants when the first defendant committed an event of default as described in the preceding paragraphs of our grounds of judgment. The defendants did not dispute the fact that they were served with the notice of demand for repayment of the loan sum that amounted to RM2,821,988.70 dated 1 July 2011. It was also not in dispute that the said amount as demanded was not paid by the defendants despite being duly notified and demanded by the plaintiff. From the notice dated 1 July 2011, the demand for repayment was clear and unambiguous. As a result of the failure on the part of the defendants to pay the amount stated in the said notice, the plaintiff was within its legal right to file this suit against the defendants in order to recover from the defendants what the plaintiff was legally entitled to recover the balance of the fully disbursed loan amount.

[25] In other words, with respect, we agreed with the submissions of learned counsel for the plaintiff that this agreement P3 had been akin to an 'on demand' agreement. A prior termination of the agreement P3 was not a pre-condition that the plaintiff was obliged to undertake before a demand could be mounted against the defendants. For the purposes of complying with the provisions of the P3, it was sufficient, in our considered view that a notice of a kind dated 1 July 2011 was served on the defendants. As such, the issue on

service of notice of termination as raised by the defendants did not, with respect, arise. In all fairness that issue was misconceived.

The matter on the admissibility of the audit report ('P27')

[26] The learned trial judge had ruled that the audit report, P27 was inadmissible. In coming to his conclusion, he had relied on the case of *Yoong Sze Fatt v Pengkalen Securities Sdn Bhd* [2011] 4 MLJ 805; [2010] 1 CLJ 484 and his penultimate finding on the issue on the admissibility of P27 was encapsulated in para [31] of his grounds of judgment, as follows: 'Dalam kes *Yoong Sze Fatt v Pengkalen Securities Sdn Bhd* keterangan berkaitan 'forgery' yang dikemukakan melalui laporan 'expert' tanpa pakar tersebut dipanggil telah diputuskan sebagai 'inadmissible'. Keterangan SP6 dengan itu telah mengalami kecacatan yang sama.

[27] With respect, there is a stark difference in the factual matrix that would clearly distinguish this case from the *Yoong Sze Fatt*'s case. It is this: In *Yoong Sze Fatt*'s case as was described by the learned trial judge, the expert who had prepared the report was not called to testify. On that basis alone, the report was rightly excluded as its maker was not called. The report of an expert contains opinions of the expert, and under the law, opinions of third parties are generally excluded, unless they are opinions of persons who are experts. This is expressly so provided under s 45 of the Evidence Act 1950. So, it is imperative that such report, unless unchallenged by the adverse party in a civil trial, must be tendered in evidence by its maker. But an entirely different set of circumstances obtains in the case on appeal before us. From the evidence, it was undisputed that the report P27 was prepared by SP6, Zeffri Azry bin Nasir. His conclusions on the forgeries were a result of his inquiry which he had undertaken on the documents that were sent to the plaintiff by the first defendant as supporting documents necessary for the drawdowns of the four tranches of the loan amounts totalling RM5m. Although the defendants denied having sent those documents, in light of the overall evidence pertaining to that averment, it had remained just a bare denial. There was no evidence forwarded by the defendants to substantiate that denial. In a civil litigation, both parties bear the same burden to establish their respective cases on the balance of probabilities. Unless of course the plaintiff's case is so devoid of merits so as to render it as one that is obviously unsustainable, and fit to be dismissed in *limine*.

[28] Going back to the audit report P27, it was prepared by SP6 and it contained the result of his inquiry involving the said documents and their sources. He had interviewed the sources and had referred to them in the report. They were persons known to the defendants. The report contained the conclusions of the interviews. The report P27 consisted of SP6's opinions on the result of his analysis of the fact-finding mission pertaining to the suspicious

documents that were used by the first defendant to support the four applications for the drawdowns of the entire loan amount of RM5m. Without these supporting documents, the plaintiff would not have released the loan amount to the first defendant. There were therefore clear instances of misrepresentations or/and fraudulent representations committed by the first defendant. The plaintiff was therefore entitled to demand for the outstanding amount from the defendants as there were clear instances of breach under section 9 of the agreement.

[29] We would, at this juncture, cite the English case of *Powe v Barclays Bank, Ltd* [1955] 3 All ER 448. The facts in that case can be seen clearly as narrated by Sachs J who had heard and decided the case with the jury. At p 449 of the report, the learned judge said: 'The present issue is whether or not there can be admitted into evidence a lengthy note made on June 19, 1952, by the witness, Mr Port, the solicitor who prepared the will of the testator, immediately after the events and interviews which led to the will being signed on June 18, 1952. The document itself was brought into existence by dictation to a typist, followed by a checking of the transcript by the witness, followed by the writing of amendments by him on the face of the document. It was then sent to the defendant bank by the firm in which the witness is the 'sole partner'. The witness did all this, as he has put it, because he realised the occasions to which the notes referred were 'very important business and, as a careful lawyer, I determined to make a record of what was done', and he added, as is quite obvious, that it was his duty to make such a record'. The defendant had attempted to admit of the lengthy note made by the solicitor during trial which was brought by the plaintiff, being the residuary legatee of the testator's estate challenging the validity of the third will. Having considered the argument as to whether the notes by the solicitor pertaining to the third will ought to be admitted, he had allowed it to be admitted over the objections raised by the plaintiff. At the same page, Sachs J had said: 'My own view is that a document which is dictated, checked and then amended in writing by a witness, certainly comes within the ambit of s 1(4) of the Evidence Act 1938, as being a document that was made or produced by that witness with his own hand. It does not matter if in fact he secured the intervention of someone else to do the actual typewriting provided that he himself sees it, checks it, and writes on it'. Having admitted the said will, he then proceeded to direct the jury as to the proper weight to be attached by the jurors on the same, when he said at p 451 of the report thus: 'I will give guidance to the jury in due course as to the weight to be given to the document'.

[30] Compared to the facts in our instant appeal, P27 did not suffer from any of the shortcomings that were present in the notes made by the solicitor pertaining to the third will. Everything about P27 was done by SP6 who undertook the inquiry into the possibility of fraud having been perpetrated on

the plaintiff's bank by the first defendant by using supporting documents which were forged to mislead the plaintiff. The question of P27 being admissible should never have been raised. So, if anything, it is a question of weight that was to be attached to P27 rather than a question of its admissibility. There was no valid reason as to why P27 ought not to be admitted as evidence.

[31] In this context, the question must be whether the report P27 was sufficient to prove the alleged fraud surrounding the impugned documents that were used by the first defendant to secure the release of the loan amount from the plaintiff. It was the plaintiff's averment that it was deceived by such conduct by the first defendant.

[32] Having said that, with respect, we agreed with the learned trial judge that the standard of proof for fraud at the material time was proof beyond reasonable doubt. He had alluded to various cases of high authority as regards the applicable standard of proof, with which we would have no cause to disagree. This case was decided by us before the apex court came out with its decision in the *Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd* [2015] 5 MLJ 1; [2015] 7 CLJ 584 case which had finally settled the law, in that the applicable standard of proof that lies on the shoulder of a plaintiff alleging fraud is one that is on the balance of probabilities. However, be that as it may, it was our considered view that the plaintiff here had discharged the required standard of proof incumbent on it to discharge in respect of the allegation of fraud as contained in paras 19–20 of the statement of claim. SP6 had alluded to the various facts in his report P27 including naming the witnesses whom he had interviewed. The defendants had done nothing to contradict those findings made by the SP6 by way of cross-examination of SP6. Neither had the defendants chosen to call those persons referred to in P27 to cross-examine them pertaining to the report 27.

[33] The law on this is rather trite. We need only to cite the oft-quoted decision in *Browne v Dunn* (1893) 6 R 67 ('*Browne*'s case') a decision of the English House of Lords on the critical significance of cross-examination of a witness called by the adverse party in a litigation. We thought that Mukerji J had synthesised the essence of the decision in the said *Browne*'s case in the case of *AEG Carapiet v AY Derderian* AIR 1961 Cal 359 where His Lordship had said: 'Wherever the opponent has declined to avail himself of the opportunity to set out his essential and material case in cross-examination, it must follow that he believed that the testimony given could not be disputed at all. This is not merely a technical rule of evidence. It a rule of substantial justice'. By the defendants failing to effectively cross-examine SP6 and by them failing to call the persons referred to in the report P27, the plaintiff had proven its case on the fraud as contained in paras 19–20 of its statement of claim, beyond a reasonable doubt.

[34] The defendants also never rebutted P27 as to its contents. They had only stated that the supporting documents that were referred to by SP6 in P27 were never sent by them. But with respect, that contention went against the weight of the evidence. They could have dispelled all doubts about the allegation of fraud in P27 by calling the persons named therein by SP6. But they did not do and we must say, for reasons best known to themselves. They took the position that they had no case to answer, which to our mind, had been proven to be erroneous. They should have led evidence to establish their version of the case. They could have confronted those persons with the P27 but they did not utilise that opportunity, by their deciding not to call those persons referred to in P27. The evidence of SP6 has been both oral and documentary. Section 60 of the Evidence Act 1950 would, with respect, apply in full force. By the defendants omitting to do so, the plaintiff had established the fraud elements as alleged to have been employed by the first defendant in securing the four drawdowns from the plaintiff amounting to RM5m. In the light of the plaintiff's evidence as per P27, the defendants could not afford to remain silent. They had a case to answer. They ought to have confronted P27 head-on by calling the relevant persons named therein and destroying SP6's evidence to shreds. This, they did not do.

[35] The learned trial judge had therefore erred in coming to the conclusion as contained in para [32] of his grounds of decision, on the matter of fraud elements in documents, such as falsification of documents, that were used by the first defendant to secure the release of the four tranches of loan amounting to RM5m.

[36] On that score, we were of the view that the learned trial judge was erred when he ruled that there was no case for the defendants to answer, in light of our view on P27 and the nature of the 'on demand of the loan repayment' in respect of P3. Since the defendants offered no evidence the case of the plaintiff must be deemed to be the truth in the absence of rebuttal evidence led by the defendants to the contrary. It was so decided in the Federal Court case of *Jaafar bin Shaari & Anor (suing as administrators of the estate of Shofiah bte Ahmad, Deceased) v Tan Lip Eng & Anor* [1997] 3 MLJ 693; [1997] 4 CLJ 509. A bare denial was hardly sufficient to negate an affirmative case presented by the plaintiff. So, with respect, nothing much had turned on such denial, in terms of supporting the defendants' case, moving forward.

[37] Premised upon the above, we were therefore of the view that in the circumstances, there were merits shown by the plaintiff as to why this appeal ought to be allowed. To recap, there was no need for a notice of termination to be served on the defendants before the plaintiff was entitled to issue a notice of demand for the outstanding sum due under the loan facility. A breach had been proven in that the first defendant had exercised fraud vide the falsified

documents, upon the plaintiff in order to secure the loan drawdowns in its favour. Such breach had triggered the default event which in turn had clothed the plaintiff with right to issue the notice of demand under section 9.01 of P3, which was admittedly served on and received by the defendants. We saw no justification as to why the plaintiff ought to be denied of what was a valid and proper claim for a sum that was due and payable to it by the defendants, by virtue of the very terms of the relevant and binding agreement, as entered between the parties.

[38] As such, we allowed the appeal by the plaintiff. The decision of the learned High Court judge dated 26 March 2014 was set aside. We therefore allowed the plaintiff's claims as prayed for in para 26(a), (b), (c), and (d) of the statement of claim. We also allowed costs of RM20,000 here and below for the plaintiff. Deposit was also refunded to the plaintiff.

Appeal allowed and decision of High Court set aside with costs of RM20,000 here and below.

Reported by Dzulqarnain Ab Fatar